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RIPARIAN RIGHTS—ANALYSIS OF NEW STATUTORY PROVISIONS

The rights of landowners to use the water resources on and contiguous to their land have been substantially clarified in Kentucky by the enactment of House Bill 497 (published in Statutes as Ky. REV. STAT. sec. 262.670 to 262.690) during the 1954 session of the Kentucky General Assembly.¹ The droughts of the two preceding years caused more farmers throughout the state to turn to the streams and lakes bordering their land to satisfy their needs. This extensive use of riparian water increased the probability of a greater number of injuries to other riparian owners, and a demand for a more satisfactory definition of riparian rights arose. With this condition in mind, the legislature considered this problem together with the problem of conservation of excess water in riparian streams, and set forth in this act a basic statement of the rights of landowners in public waters. The act also provides for the Legislative Research Commission to make a thorough study of all problems relating to water resources, and to report its findings to the 1956 legislature.

Before considering the sections of the act itself, some basic principles governing a landowner's right to use water should be stated. A riparian proprietor is one who owns land which abutts a natural stream, and riparian rights are those which such a proprietor has in the stream.² In general, the owner of land has a comparatively unlimited right to the undisturbed use of his land. The principles of ownership and use applying to land also apply to surface water found on the land. This means in effect that one's right to use non-riparian water is exclusive. Because of the fugitive nature of riparian water, which is water flowing in a stream, the landowner's rights and privileges to use this kind of water are less absolute.³ He in fact has a non-exclusive right to use this water.

This characteristic of riparian rights stemmed historically from the Roman Law principle that all of the riparian owners had a mutuality of right in the stream, so that the extent of the right of any riparian owner depends on the effect his use has on the other riparian owners' use. Although this principle originated in Roman Law, it was made a

¹ An act relating to the conservation, development and use of water resources, effective July 1, 1954, after being passed with only two opposing votes in the House and one in the Senate.

² "Briefly, a riparian proprietor is one whose land is bounded or traversed by a natural stream, and riparian rights are those which such a proprietor has to the use of the stream or water." 56 AM. JUR. 726 (1947).

³ See, RESTATEMENT, TORTS (1938) Topic 3 following sec. 849 giving a general discussion of these principles.

foundation stone in the common law doctrine of riparian rights by Anglo-American courts.⁴

In applying this common law doctrine, the American courts particularly have used two ideas to measure the extent of the riparian right. In the first place, they have made a distinction between using water for a "natural" purpose and using it for an "artificial" purpose. If the riparian proprietor uses the water in a stream for such domestic purposes as watering his stock or supplying his household necessities, he is using it for a "natural" purpose, and he will not be liable to another landowner for this use even though the water in the stream is completely diminished.⁵ Where the upper riparian proprietor uses the water in the stream on his land for "artificial" purposes such as manufacturing or irrigation,⁶ he may use only so much of the water as will not deny to the lower owner an equality of use. In the second place, a distinction is made between the "natural flow" theory and the "reasonable use" theory for the purpose of determining equality in use. Under the natural flow theory the riparian landowner has the privilege to use the water so long as such use does not effect the natural quantity or quality of the water. Under the reasonable use theory the riparian landowner has the right to use so much of the water as will not unreasonably interfere with the use of others.⁷

The Court of Appeals has not settled upon one or the other of

⁴ There was no common law doctrine of riparian rights in the sense that the words are used to convey a concept of early English law of water rights. The uses of the streams by a riparian proprietor before the industrial revolution were limited to occupations such as running mills, and the doctrine which the English courts applied to protect the rights of owners was relatively simple, namely, "first come, first served." The law of riparian rights after originating in America, did not come to England until 1820 and 1840, and it might therefore more properly be called a "modern" common law doctrine. See, *supra* note 3. See also, Busby, *American Water Rights Law: A Brief Synopsis of Its Origin and Some of Its Broad Trends with Special Reference to the Beneficial Use of Water Resources*, 5 S.C.L.Q. (1952).

⁵ Wiel, *Water Rights in Western States*, sec. 740 (1911) states as follows: "Natural uses are those arising out of necessities of life on the riparian land, such as household use, drinking, watering domestic animals. For these purposes the riparian owner may take the whole stream if necessary, leaving none to go down to lower riparian proprietors." Also in sec. 741 it is stated: "The term 'natural uses' is probably based on the idea running through other branches of the common law, that there is such a thing as an 'ordinary' or 'natural' or elemental use of the land; a use, so to speak, for which nature intended it, in contrast with other uses to which land is put. If, in using the land in the natural or ordinary way, damage follows to a neighbor, it is not wrongful at law; it is *damnum absque injuria*."

⁶ *Lone Tree Ditch Co. v. Cyclone Ditch Co.*, 26 S.D. 307, 128 N.W. 596, 598 (1910) said: "These rights of riparian owners have at all times been divided into two classes, dependent upon the use to which the water is to be put, which uses have been variously denominated 'ordinary' or 'extraordinary' and 'natural' or 'artificial.' The so-called . . . natural use includes the use of the water for domestic purposes and for watering stock. The extraordinary . . . use including manufacturing, mining, and irrigation."

⁷ *Supra* note 3.

these two theories, and prior to the enactment of this statute Kentucky had no basic statutory law on the question. From the cases decided, it is difficult to determine whether the court has applied the reasonable use theory or the natural flow theory.⁸ In the last case decided concerning the right to use water in a stream or lake,⁹ the court said that even though the distinction between the two theories was very close, it was committed to the natural flow theory, but the theory that the court applied to the facts which were being considered at that time was the reasonable use theory.¹⁰ The confusion in this one case is sufficient to show why some have taken the position that Kentucky does not apply either theory in the cases, but applies a little of both.¹¹ The new legislation attempts to set out some applicable basic principles designed to establish a reasonable use theory in this state.

The action of the state, provided for in the act, is authorized under the well-defined power of the state to regulate the rights of private landowners and to permit the appropriation of flowing waters for such purposes as it may deem wise.¹² Also section 1 of House Bill 497 (KY. REV. STAT. sec. 262.670) declares that the welfare of the people demands that the natural water resources of the state be conserved and regulated under the general welfare clause of the state constitution.¹³ Apparently it was felt by the General Assembly that this state-

⁸ "It is true, as suggested by counsel for appellant, that our court is committed to the 'natural flow rule' though as we read the two rules (Reasonable Use) . . . the distinction is rather close, and even under what may be termed the more restricted theory, [natural flow] . . . each riparian owner is recognized as having a privilege to use the water to supply his natural wants, and extraordinary or artificial uses, so that such does not sensibly or materially affect the quantity of the water and such uses by a lower riparian owner." *City of Louisville v. Tway*, 297 Ky. 565, 569; 180 S.W. 2d 278, 280 (1944). See also, 40 Ky. L.J. 423 (1951).

⁹ *Ibid.*

¹⁰ *Id.* at 570, 180 S.W. 2d 281. The Court of Appeals of Kentucky said: "There was a failure to show that either Mrs. Hert or Mr. Tway made unreasonable use of the water from the stream or springs, and there is not sufficient evidence that the acts charged seriously or unreasonably amounted to such an injury to the lower riparian owner (or owners) as will entitle them to an injunction."

¹¹ "It must be concluded from these two cases and the language used by the court in its opinions that the Kentucky rule lies somewhere between the natural flow theory and the reasonable use theory. It is believed that Kentucky would not permit as extensive a use of the water for irrigation in a particular fact situation as would a jurisdiction which applies the reasonable use theory strictly. On the other hand, it might be said with equal safety that the Court of Appeals of Kentucky would go further than would a court applying the natural flow theory strictly." 40 Ky. L.J. 423 at 430 (1951).

¹² *Connecticut v. Massachusetts*, 282 U.S. 660 (1931); *U.S. v. Rio Grande Dam and Irrigation Co.* 174 U.S. 690 (1898).

¹³ KY. REV. STAT. sec. 262.670 provides in full: "The conservation, development and proper use of the water resources of the Commonwealth of Kentucky has become increasingly important as a result of technological advances, agricultural production problems and varied industrial, municipal and recreational

ment in section 1 was needed to assure the constitutionality of the legislation under the state constitution.

Section 2 (Ky. REV. STAT. sec. 262.680) is an express statement of the scope of the regulation of the act.¹⁴ It is made in terms of "public water" which is defined primarily as riparian water as follows:

Water occurring in any natural stream, natural lake or other natural water body in the Commonwealth which may be applied to any useful and beneficial purpose is hereby declared to be a natural resource and public water of the Commonwealth and subject to control and regulation for the public welfare.¹⁵

"Diffused surface water"¹⁶ flowing over the surface of the ground and "water left standing in natural pools"¹⁷ after the streams have receded are excluded from the classification of public waters, and they are not to be regulated.

Diffused surface waters are casual waters flowing on the surface of the land which have not found their way to the stream. By excluding this type of water from the regulation of the act, one is led to believe that it could be used without limitation, which is the existing case law.¹⁸ But to also exclude water left in pools in the bed of the stream, and thereby permit an exclusive use of it, seems to be a significant alteration in the rights of riparian landowners. After water has reached the stream channel, it is generally treated as riparian

uses. Excessive rainfall at certain seasons causes damages from overflowing streams. Prolonged droughts at other seasons curtail industrial, municipal, agricultural and recreational uses of water and threaten the economic well being of the Commonwealth. The advancement of the safety, happiness and protection of property of the people require that power inherent in the people be utilized to promote and to regulate the conservation, development and proper use of the water resources. It is hereby declared that the general welfare requires that the water resources of the Commonwealth be put to beneficial use to the fullest extent of which they are capable, and that the waste or non-beneficial use of water be prevented, and that the conservation and beneficial use of water be exercised in the interest of the people. The proper investment of public and private funds to promote the conservation and beneficial use of water resources is recognized as being in the public interests and such investments shall be encouraged."

¹⁴Ky. REV. STAT. 262.680 provides in full: "Water occurring in any natural stream, natural lake or other natural water body in the Commonwealth which may be applied to any useful and beneficial purpose is hereby declared to be a natural resource and public water of the Commonwealth and subject to control and regulation for the public welfare. Diffused surface water which flows vagrantly over the surface of the ground shall not be regarded as public water, and the owner of the land on which such water falls or flows shall have the right to its use. Water left standing in natural pools in a natural stream when the natural flow of the stream has ceased shall not be regraded as public water and the owners of the land contiguous to that water shall have the right to its use for their purposes."

¹⁵*Ibid.*

¹⁶*Ibid.*

¹⁷*Ibid.*

¹⁸*Republic Production Co. v. Collins*, 41 S.W. 2d 100 (Tex. Civ. App. 1931); *Barkley v. Wilcox*, 86 N.Y. 140, 40 Am. Rep. 519 (1881).

water even after it has stopped its motion. Prior to the statute the riparian proprietor could use water left in pools in the bed of the stream only to the extent that his use did not prejudice the lower riparian landowner.¹⁹ The right of the lower owner was obviously somewhat hypothetical since the water would not flow down stream, but in any event, the legislature apparently felt that by not applying the riparian rights to this kind of water, the advantages to be achieved would compensate for a change in the law. The farmer is now clearly given another source of water to use freely in a time of need without having to follow the pattern established by the subsequent sections of this Act.

One of the most significant sections of House Bill 497 is section 3 (Ky. REV. STAT. sec. 262.690) which sets forth the rights of landowners to use the public waters of the state.²⁰ The first of the three subsections deals with the superior right of the landowner to use public water contiguous to his land in an amount sufficient to "satisfy his needs for domestic purposes."²¹ The right of the riparian landowner to use water for domestic purposes without being liable to a lower riparian owner has been an established principle in the law,²² but the definition of what the domestic purposes are to include has not been set out in any detail. In Kentucky many of the cases have referred to domestic purposes as merely being the "ordinary" purposes of a farm.²³ Subsection 1 expressly declares that domestic purposes will now in-

¹⁹ *Humphries Mexico Co. v. Arseneaux*, 116 Tex. 603, 297 S.W. 2d 225 (1927).

²⁰ Ky. REV. STAT. 262.690 provides in full: "(1) The owner of land contiguous to public water shall at all times have the right to the use of water therefrom in the quantity necessary to satisfy his needs for domestic purposes, which shall include water for household purposes, drinking water for livestock, poultry and domestic animals. The use of the water for such domestic purposes shall have priority and be superior to any and all other uses.

"(2) The owner of land contiguous to public water shall have the right to such reasonable use of this water for other than domestic purposes as will not deny the use of such water to other owners for domestic purposes, or impair existing uses of other owners heretofore established, or unreasonably interfere with a beneficial use by other owners.

"(3) An owner or group of owners of land contiguous to public water shall have the right to impound and conserve such water for their use by impounding such water behind a dam in a natural stream bed or on their land or by pumping such water from the stream or lake to a reservoir when the flow in the stream or the level of the lake is in excess of existing reasonable uses. An obstruction placed across a natural stream shall provide an outlet for the release of water which the owner is not entitled to use under this Act, and the owner shall operate the outlet in accordance with this provision."

²¹ *Ibid.*

²² *Kentucky: Anderson v. Cincinnati So. Ry.*, 86 Ky. 44, 5 S.W. 49 (1887); *Redman v. Forman*, 83 Ky. 214 (1885). Other Jurisdictions: *Harvey Realty Co. v. Borough of Wallingford*, 111 Conn. 352, 150 Atl. 60 (1930); *People v. Hulbert*, 31 Mich. 156, 91 N.W. 211 (1902); *Garwood v. New York C. & H. R.R. Co.*, 83 N.Y. 400, 38 Am. Rep. 452 (1880).

²³ *Redman v. Forman*, 83 Ky. 214 (1885).

clude "household purposes, drinking water for livestock, poultry and domestic animals."

A great deal of the vagueness revolving around domestic purposes as defined in the cases will be eliminated by this elaboration, but the provision of the act is not without possible difficulty. Suppose a large herd of livestock owned and raised for commercial sale by an upper riparian owner decreases the amount of water left in a stream to the extent that a lower riparian owner is deprived of an amount sufficient for his domestic needs. Can this use be justified on the grounds that it is for a "domestic purpose" since the statute includes the phrase "drinking water for livestock"? Domestic purposes in this subsection are meant to include common law natural uses which arise out of the necessities of life on the land and form a constituent part of the land. To allow a riparian proprietor to satisfy the watering needs of a great number of livestock in order to sell them commercially without being liable to a lower owner for any damage, is to permit a use which was not meant to be included within the definition of "domestic purposes" of the act. A possible solution would be to define further domestic purposes by limiting the "drinking water of livestock," as provided in the statute, to non-commercial livestock only.

After thus providing the first right that a riparian proprietor has to the use of public water, the act proceeds to define another right which he has in the water. In subsection 2 of section 3 (KY. REV. STAT. sec. 262.690) the legislature has attempted to provide a basic theory which will give all riparian proprietors the right to use public water without being liable to another riparian proprietor.²⁴ Subsection 2 provides as follows:

The owner of land contiguous to public water shall have the right to such *reasonable* use of this water for other than domestic purposes as will not deny the use of such water to other owners for domestic purposes or impair existing uses of other owners heretofore established, or *unreasonably* interfere with a beneficial use by other owners. (Emphasis supplied by writer)

The statute expressly states that a riparian proprietor shall have the right to the "reasonable use" of public water.²⁵ The amount of

²⁴ *Supra* note 20.

²⁵ *Supra* note 20, subsec. 2.

²⁶ RESTATEMENT, TORTS sec. 852 provides: "A riparian proprietor's use of water is unreasonable . . . unless the utility of the use outweighs the gravity of the harm." Comment C provides: "*Determination of unreasonableness.* The determination in a particular case of the unreasonableness of a particular use is not and should not be unreasoned, intuitive conclusion on the part of a court or jury. It is rather an evaluating of the conflicting interests of each of the contestants before the court in accordance with the standards of society, and a weighing of these one against the other."

water which may be extracted from the stream without being an unreasonable portion will have to be decided by cases which will arise later in applying the statute.²⁶

There is an attempt by the legislature to provide some analysis as to how the reasonable use theory is to be applied. The statute says that the riparian landowner has the right to the reasonable use of the water in a stream as long as there is enough left to supply a lower owner's domestic purposes. This is a reemphasis of the point that uses for domestic purposes are to have priority over other uses, which is stipulated in the preceding subsection of the statute. The statute further states that the upper riparian proprietor must also reasonably respect the uses of other riparian owners already established and the right of others to their beneficial use of the water.

The language of section 3 subsection 2 (Ky. REV. STAT. sec. 262.690) is plain and unambiguous except in one possible place. Looking at the language of the subsection as it is set out above, it is seen that the act provides that a riparian owner shall have the right to the reasonable use of water which will not deny others sufficient water for domestic purposes, "or impair existing uses of the owners heretofore established. . . ." Nowhere in the quoted phrase does the word unreasonable appear, and upon reading the words with due emphasis on the punctuation, they seem to say that the reasonable use theory is not applied to uses of public water already established. That is, the question in a case would not be whether there was an unreasonable use of the water, but whether the use has injured the landowner by interfering with a prior existing use. This is the principle that has been adopted by the Court of Appeals of Kentucky in applying the natural flow theory,²⁷ but it is the intention of the legislature not to apply that theory to riparian rights. Therefore, it would be clearer if the word "unreasonable" were inserted just after the conjunction "or" as was done in the immediately following phrase. The courts may very well make this insertion in interpreting the statute, but if they do not, the wording should be corrected by the Kentucky legislature.

When a stream is at its lowest ebb because of an existing drought, every contiguous landowner turns to it to use the water on his suffering crops and stock. In subsection 3 of section 3 (Ky. REV. STAT. sec.

²⁷ *Anderson v. Cincinnati So. Ry.*, 86 Ky. 44, 5 S.W. 49 (1887). The Court of Appeals said: ". . . if the dam so obstructs the water as to diminish the flow and lessen the capacity of the water below, it is an injury to the proprietor for which damages may be awarded. The question, therefore, in this case is not whether the railroad company made an unreasonable use of the water, but whether its use for the purpose of the railroad injured the mill below."

²⁸ *Supra* note 20, subsec. 3.

262.690(3)) an attempt is made to get the landowner to impound water while it is at its excess, such as in a flood period, so that the water will be available during a later drought.²⁸ Before the present act, a landowner who impounded water was liable if as a result the lower riparian owner was denied his lawful use of the water.²⁹ Such strict liability is now avoided by allowing and encouraging dams or other devices to be used to conserve water for later use in the low-flow seasons. In the words of Mr. Henry Ward, Kentucky Commissioner of Conservation, in explaining the purpose of the Bill to the legislature, "That is the most important single aspect of the whole problem."³⁰

The landowner is permitted to impound the public water when "... the flow in the stream or the level of the lake is in excess of existing reasonable use."³¹ The difficulty to be met in analyzing this language is obvious. What constitutes a "reasonable use" under the circumstances will have to be determined, and too, just how much more than a reasonable use will be "in excess." Both of these unknowns will have to be further defined by judicial interpretation before the farmer will be able to impound water, as the act provides, with some assurance that he has complied with the act.

There is also a condition attached to the right of a riparian owner to impound public water under subsection 3 which provides that if an obstruction is placed across a stream, an outlet shall be provided to release water beyond what the owner is entitled to use. The owner is entitled to use a reasonable amount, and therefore, he must release, and continue to release, an amount of water that will prevent him from storing an unreasonable portion. This would include a stream sufficient to furnish a lower riparian owner at least his fair share for domestic purposes. As the drought ensues the owner would have to continue to let some water out, and it would seem that at the time he would need water most, he would have released most of what he had stored.

It is thus seen from the preceding discussion of House Bill 497 that Kentucky has taken an important step in defining some basic points on the rights of riparian proprietors. In an initial statute of this sort, ambiguous provisions are certain to arise, though the General Assembly seems to have avoided many major difficulties which could

²⁸ *King v. Board of Council City of Danville*, 128 Ky. 321, 107 S.W. 1189 (1908); *Warmark v. Holbrook*, 7 Ky. Opin. 614 (1874).

²⁹ "A Review of Efforts to Produce a Declaration of Policy and Basic Law on the Broad Subject of Water Resources," a statement issued by Henry Ward, Commissioner of Conservation of the Commonwealth of Kentucky, released to the legislature while it was in general session.

³¹ *Supra* note 20, subsec. 3.

have arisen. Such ambiguity, as for instance, what constitutes a reasonable use or an excess of existing reasonable uses, will have to be determined by the Court of Appeals after considering the circumstances of the cases as they arise. If judicial interpretation is not sufficient to eliminate this difficulty, the only alternative is to amend the statute in the next session of the General Assembly.

House Bill 497 is not intended to be a comprehensive water law. It would be impossible to devise a law which would solve all problems before they arise. If the recent serious droughts in the state continue, more farmers will prepare to meet their water needs through irrigation,³² and the incidence of water rights litigation will surely increase. In the fourth and final section of the Bill the Legislative Research Commission has been directed to conduct a study of other specific water problems.³³ If it is the aim of the legislature to enact a complete water code eventually, the enactment of this statute is a good beginning.

J. ARNA GREGORY, JR.

DOMESTIC RELATIONS—CAPACITY TO MARRY

In *Littreal v. Littreal*,¹ the Kentucky Court of Appeals was asked to reverse a decree annulling the marriage of an adjudged incompetent. The husband married after he had been adjudged incompetent and a committee had been appointed. After a short time he abandoned the wife at the request of his daughter. The wife, upon being notified by the committee that she would have to leave the home of the husband, filed suit for separate maintenance. The committee filed an answer and counterclaim asking that the marriage be declared null and void due to the husband's lack of mental capacity. The trial court annulled the marriage and the wife appealed. The Court of Appeals reversed the chancellor on the ground that the evidence was insufficient to establish the mental incapacity of the husband at the time of marriage.

It is significant to point out that only the marriage of an *idiot* or

³²For data of increased irrigation in Kentucky, see note Ky. L.J. 493 (1954).

³³House Bill 497 as adopted provided in full: "Section 4. The General Assembly recognizes that many specific problems relating to water resources exist. To secure additional information on this subject the Legislative Research Commission is hereby directed to conduct a study of water resources, usage and rights and report its finding to the General Assembly at the 1956 session. All other agencies of the Commonwealth shall cooperate with the Legislative Research Commission in making this study when requested by the Commission to do so."

¹253 S.W. 2d 247 (Ky. 1952).